Supreme Court, U.S.
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Nos. 87-25 and 87-60

In the Supreme Court of the United States

OCTOBER TERM, 1987

NORTHERN IMPROVEMENT COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

STEVE MCCORMICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

4 pp

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Petitioners contend that the court of appeals erred in reversing an order that had dismissed an indictment on the ground that it was barred by the statute of limitations.

On October 9, 1985, a grand jury sitting in the District of North Dakota indicted petitioners on one count of violating Section 1 of the Sherman Act, 15 U.S.C. 1. The indictment charges that, beginning at least as early as 1975, and continuing at least through July 28, 1981, petitioners engaged in a continuing agreement to submit collusive, noncompetitive, and rigged bids for municipal street improvement projects

let by the Cities of Fargo, North Dakota; West Fargo, North Dakota; and Moorhead, Minnesota. 87-25 Pet. App. 18-19; 87-60 Pet. App. 8-9.

On April 25, 1986, the district court dismissed the indictment on the ground that it had not been returned within the five-year period of limitations in 18 U.S.C. 3282.87-25 Pet. App. 29; 87-60 Pet. App. 19. The court held that the conspiracy terminated on the day on which the last rigged bid was submitted, rather than the last day on which a conspirator accepted the profits from a contract obtained by a rigged bid (87-25 Pet. App. 28; 87-60 Pet. App. 18). On March 24, 1987, the court of appeals reversed. It concluded that, if the purpose of an illegal agreement is the receipt of payments on an illegally obtained contract, the acceptance and retention of those contract payments are overt acts in furtherance of the conspiracy for statute of limitations purposes. 87-25 Pet. App. 34-35; 87-60 Pet. App. 24-25.

Petitioners contend (87-25 Pet. 8-10; 87-60 Pet. 4-7) that an antitrust conspiracy must be treated differently from other criminal conspiracies—specifically that, once a rigged bid is submitted, trade is no longer being restrained and that any "objectives ancillary to the objective of actually restraining trade" (87-25 Pet. 9) do not continue the conspiracy for statute of limitations purposes. The corporate petitioners also contend (*id.* at 10-14) that this antitrust conspiracy did not continue past the bid date because the conspirators did not engage in joint or "cooperative" action to divide the spoils of their illegal agreement.

Whatever the merits of petitioners' contentions, they are not yet ripe for review by this Court. The decision of the court of appeals places petitioners in precisely the same position they would have occupied if the district court had denied their motion to dismiss. If petitioners are acquitted following a trial on the merits, their contentions will be moot. If, on the other hand, petitioners are convicted and

their convictions are affirmed on appeal, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the decision of the court of appeals would be premature at this time.*

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JULY 1987

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*Because this case is interlocutory, we are not responding on the merits to the questions presented by the petitions. We will file a response on the merits if the Court requests.